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No. 572

In the Supreme Court of the United States

OCTOBER TERM, 1964

SIDNEY LEFKOWITZ AND ROSE LEFKOWITZ, PETITIONERS

v.

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–11) is reported at 334 F. 2d 262. The findings of fact and conclusions of law of the district court (Pet. App. 12–24) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1964 (Pet. App. 26–27). The petition for a writ of certiorari was filed on October 9, 1964. This Court's jurisdiction is invoked under 28 U.S.C. 1245(1).

QUESTION PRESENTED

Whether a taxpayer's prior criminal conviction for willfully attempting to evade and defeat a tax collaterally estops him from seeking a refund of civil fraud penalties assessed against him for those same years.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.
>
> * * * * *
>
> (b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

STATEMENT

Petitioner Sidney Lefkowitz was convicted of willfully attempting to evade and defeat his income taxes, in violation of Section 145(b) of the Internal Revenue

Code of 1939, *supra*, p. 2, for the years 1951, 1952 and 1953 (Pet. App. 20; R. 20). See *United States* v. *Lefkowitz*, 173 F. Supp. 932 (E.D. Pa.).[1] Subsequently, the Service assessed fifty percent fraud penalties (under Section 293(b) of the 1939 Code, *supra*, p. 2) against petitioners for those same years in the following amounts (R. 7, 17):

1951	$8,975.68
1952	6,866.08
1953	8,128.57
Total	23,970.33

The penalties were paid, and petitioners brought the present action to recover a refund of these and other penalties (Pet. App. 12–13, 16; R. 5, 7, 13, 17).[2]

At the trial, the government introduced certified copies of the indictment and of the judgment and commitment (R. 10, 37–39). The district court held (Pet. App. 21–23; R. 21–23) that petitioner's prior conviction of willfully attempting to evade and defeat taxes for the years 1951–1953 operated as collateral estoppel

[1] The cited opinion, filed on denial of petitioner's motion for judgment n.o.v. or for a new trial, recites some of the evidence on which the criminal conviction was based. It was shown that, despite very accurate records indicating his substantial tax liability, petitioner withheld filing his returns for the years here at issue in the hope that the Service would assess a lesser amount. When the indictment was filed, revealing the Service's Preliminary estimate of petitioner's tax liabiilty, he filed returns indicating those amounts as due, though it was later shown (as petitioner himself admitted) that his liability was greater than the indictment suggested. It was also brought out that petitioner referred the Revenue agents to his accountant in another city, to whom he had given incomplete income information, rather than submitting his own accurate records, in an obvious attempt to mislead them.

[2] Issues relating to these other penalties are not raised in the instant petition.

to foreclose him from relitigating the question of fraud for those years. The court of appeals unanimously affirmed as to this issue (Pet. App. 11, 27), holding (Pet. App. 3–8) that the "fraud" finding required to impose the civil penalty under Section 293(b) of the 1939 Code was necessarily included in the willfulness finding required for his conviction under Section 145(b) of the 1939 Code.

ARGUMENT

1. The principal holding below—that a person who has been convicted of a willful attempt to evade and defeat a tax is collaterally estopped from contesting the assessment of civil fraud penalties for the same years—is plainly correct. This Court has long held that an issue resolved in the government's favor in a criminal case is foreclosed to further litigation in a subsequent civil action between the same parties. *Local 167* v. *United States,* 291 U.S. 293, 298–299; see *Emich Motors* v. *General Motors,* 340 U.S. 558, 568–569.[3] That principle is fully applicable here. As the court of appeals held (Pet. App. 6–7), a finding of willful attempt to evade and defeat a tax within the prohibition of Section 145(b) of the 1939 Code necessarily includes the elements of "fraud" required under Section 293(b); both sections imply an intent to prevent the government from determining and assessing a taxpayer's correct liability for taxes, the

[3] By the same token, this Court has held that an issue decided against the government in a criminal case may be relitigated in a subsequent civil action because of the higher standard of proof required in a criminal prosecution. *Helvering* v. *Mitchell,* 303 U.S. 391.

only difference being that the criminal prosecution requires a stronger showing of evil motive. *Spies* v. *United States*, 317 U.S. 492, 497; compare, *United States* v. *Martell*, 199 F. 2d 670, 672 (C.A. 3d), certiorari denied, 345 U.S. 917, with *Davis* v. *Commissioner*, 184 F. 2d 86, 87 (C.A. 10th). Conviction under the tax evasion provision of the criminal statute, therefore, constitutes an adjudication that the taxpayer was guilty of civil fraud.[4]

Petitioners point to a conflict between the decision below and those of the Tax Court (Pet. 4). This conflict no longer exists, for the Tax Court has now changed its view and is in complete agreement with the instant decision. *Amos* v. *Commissioner*, 43 T.C. No. 6. The contrary decision of a single district court in *Moore* v. *United States* (W.D. Va.), decided August 7, 1964 (14 A.F.T.R. 2d 5612), does not create such a conflict as to require this Court's intervention at this time.[5]

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[4] Of course, the civil fraud penalties arise only when the taxpayer's fraudulent conduct results in a deficiency. The existence and amount of that deficiency are not foreclosed by the verdict of guilty in the criminal case.

[5] Petitioners alternatively ask (Pet. 5) that this Court reserve its ruling on the instant petition until such time as the *Moore* case may be appealed to and decided by the Fourth Circuit. Judgment has not yet been entered in that case, so that (assuming the government were to appeal) the Fourth Circuit would not be in a position to decide it for a very long time. If the Fourth Circuit were to reverse *Moore*, as would be probable in view of the district court's heavy reliance on the now overruled Tax Court opinion in *Safra* v. *Commissioner*, 30 T.C. 1026, there would remain no conflict whatever. In these circumstances, we submit that no useful purpose would be served in reserving a ruling on the pending petition.

2. Petitioners' "subsidiary" issue (Pet. 4)—whether the wife may challenge the fraud penalties assessed jointly against her husband and herself—is also groundless. As the court of appeals noted (Pet. App. 8), this question was not presented to the trial court. But, it is, in any event, without substance in the present context. Assuming, *arguendo,* that the wife could have contested the proposed assessment against her of fraud penalties in an action in the Tax Court (*Cirillo* v. *Commissioner,* 314 F. 2d 478 (C.A. 3d)), or that she would have been entitled to a refund of any part of the fraud penalties which she had paid (*Spanos* v. *United States,* 323 F. 2d 108 (C.A. 4th)), the facts of this case show she did not go into the Tax Court, and she neither alleged nor offered any evidence to show that *she* had paid any portion of the fraud penalty.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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